No. 84-154

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

DORIS M. CALDER,

Petitioner,

vs.

MAX D. CRALL and
SGT. TERRY L. EARL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented

1. Whether negligent servicemen are immunized from suit brought by civilian employees of the Army-Air Force Exchange Service, on the basis that such a suit is a suit against a federal co-employee, and thus barred by 33 U.S.C. §933(i)?

2. Do civilian employees of the Army-Air Force Exchange Service have federal employee status for purposes of precluding suit against negligent servicemen, even though 5 U.S.C. §2105 excludes such status?

3. Whether the underlying policies of the **Feres** doctrine precludes a personal injury suit by a civilian employee of a non-appropriated fund instrumentality, against a negligent serviceman?

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IN THE SUPREME COURT OF THE UNITED STATES

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_____Respondents

The petitioner, DORIS M. CALDER, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 24, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 726 F.2d 598, appears as Appendix "A". That Court's order denying petitioner's petition for rehearing and suggestion that the case be heard en banc appears as Appendix "B".

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered February 24, 1984. A timely petition for rehearing and suggestion that the case be heard en banc was denied May 24, 1984. Timely motion to stay issuance of mandate was granted on June 18, 1984, which appears as Appendix "C". This Petition for Certiorari will have been filed within 90 days of the court's denial of petition for rehearing and suggestion that the case be heard en banc. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

FEDERAL STATUTES AND REGULATIONS INVOLVED

5 U.S.C. §2105(c) provides:

Employee

(c) An employee paid from non-appropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy Exchange, Marine Corps Exchanges, Coast Guard Exchanges and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of - -

(1) laws (other than sub-chapter IV of Chapter 53 and Sections 5550 and 7204 of this title) administered by the Office of Personnel Management; or

(2) sub-chapter I of Chapter 81 and Section 7902 of this title.

This sub-section does not affect the status of these non-appropriated fund activities as Federal instrumentalities.

(Pub. L. 96-54, §2(a)(5); 93 Stat. 381)

5 U.S.C., §8171(a) and (b) provides:

Compensation for Work Injuries; Generally

(a) Chapter 18 of Title 33 applies with respect to disability or death resulting from injury, as defined by Section 902(2) of Title 33, occurring to an employee of a non-appropriated fund instrumentality described by Section 2105(c) of this title who is - -

(1) a United States citizen or a permanent resident of the United States or a territory or possession of the United States employed outside the continental United States; or

(2) employed inside the continental United States.

However, that part of Section 903(a) of Title 33 which follows the first comma does not apply to such an employee.

(b) For the purpose of this sub-chapter, the term "employer" in Section 902(4) of Title 33 includes the non-appropriated fund instrumentalities described by Section 2105(c) of this title.

(Pub. L. 89-554, §1; 80 Stat. 555)

33 U.S.C. §933(i) provides, in relevant part:

Compensation for Injuries
Where Third Persons Are Liable

> (i) Right to compensation as exclusive remedy. The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured . . . by the negligence or wrong of any other person or persons in the same employ: Provided, That, this provision shall not affect the liability of a person other than an officer or employee of the employer.

(Pub. Law 92-576, §15(f)-(h); 86 Stat. 1262)

20 C.F.R. §701.301(a)(12) and (13), provide:

> (12) "Employee" includes any employee to whom an injury, as defined in Section 2(3) of the L.H.W.C.A. may be the basis of a compensation claim under the L.H.W.C.A. as amended or any of its extensions.
>
> (13) "Employer" includes any employer who may be obligated as an employer under the provisions of the L.H.W.C.A., as amended or any of its extensions to pay and secure compensation as provided therein.

STATEMENT OF THE CASE

Petitioner, Doris M. Calder, was a civilian employed as a cashier by the Army-Air Force Exchange Service (hereafter AAFES) at the base exchange cafeteria of Fairchild Air Force Base located in Spokane County, Washington. On March 27, 1975, Sgt. Earl, an Air Force enlisted man, was in need of assistance in placing disaster shelter signs in various buildings around the base. Mr. Crall, a civilian employed as a carpenter at the base, was assigned to accompany Sgt. Earl and assist him.

Since it was necessary to post the shelter signs with a steel nail, Mr. Crall obtained a fastener gun from the base carpentry shop. The gun is activated by a .22 caliber shell that blasts a steel nail into concrete, steel or wood. Respondents failed to test the composition of the wall where the sign was to be affixed. When the fastener gun was fired, the nail penetrated the wall, since it was plaster covered sheet rock, and Mrs. Calder was struck by the nail which embedded in her thigh. Mrs. Calder received lost wages and medical benefits pursuant to the Longshoremen and Harbor Workers Compensation Act (hereinafter LHWCA).

Respondents moved to dismiss Mrs. Calder's action on the basis that her coverage under the LHWCA was her exclusive remedy and she was not entitled to sue a federal co-employee pursuant to 33 U.S.C. §933(i). Sgt. Earl further argued that petitioner's claim was barred by the **Feres** doctrine. The District Court judge denied respondents' motions.

The District Court held the parties were not co-employees because they were covered under separate and distinct workers compensation funds and the federal government had no obligation to pay premiums nor to receive any benefits under the LHWCA. The District Court further held that respondents did not meet

the statutory definition of employee and the federal government did not meet the statutory criteria of employer under 20 C.F.R., §701.301(a)(12) and (13), respectively.

The United States Court of Appeals for the Ninth Circuit held, that the parties were both federal co-employees. It precluded Mrs. Calder's suit and considered her a federal employee even though she was exempted from federal employee status under 5 U.S.C. §2105(c).

REASONS FOR GRANTING THE WRIT

The correctness of the decision below is open to serious question. The court's holding affects many thousands of civilians employed in military facilities located not only in the United States, but throughout the world. Under 5 U.S.C. §2105(c), non-appropriated fund instrumentality employees are not considered federal employees for purposes of workers compensation. Pursuant to 5 U.S.C. §8171(a) compensation and disability for work-related injuries is to be provided under the LHWCA which specifically reserves to the employee the right to recover damages against negligent third parties, 33 U.S.C. §933(i). Since Congress has specifically declined to designate Mrs. Calder as a federal employee for purposes of workers compensation, then she cannot be a federal employee for purposes of allowing respondents to assert such status against her. This issue is one of first impression.

The Court of Appeals decision leaves unsettled an important area of federal law which involves all uniformed and civilian employees of the military services. The intent of 5 U.S.C. §2105(c) is clear. Congress created a separate class of individuals who are not federal employees for purposes of workers compensation. This court recognized in **United States v. Hopkins,** 427 U.S. 123 (1976), that Congress had specifically granted Army-Air Force Exchange Service employees certain rights only afforded such employees and also specifically excluded them from coverage of certain statues. This court should therefore take issue with the Court of Appeals' failure to recognize that Army-Air Force Exchange Service employees were specifically excluded as federal employees for purposes of worker's compensation, and are entitled to sue negligent third persons.

The Court of Appeals also relied on **United States v. Forfari,** 268 F.2d 29 (9th Cir.), **cert. den'd,** 361 U.S.

901 (1959), which involved an action by a non-appropriated fund instrumentality employee under the Federal Tort Claims Act against the United States. Such an action is specifically precluded by statute, 5 U.S.C., § 8173. Petitioner is not asserting a claim against the United States, nor is there a question regarding United States liability. **Forfari** found that a non-appropriated fund instrumentality employee is an employee of the United States for purposes of suit against the United States.

Under the Federal Employees Compensation Act (5 U.S.C. §8102 et seq.) which covers Mr. Crall, he is entitled to sue a negligent co-employee. **Bates v. Harp,** 573 F.2d 930 (6th Cir. 1978); **Alman v. Hanley,** 302 F.2d 59 (5th Cir. 1962); **Marion v. United States,** 214 F.Supp. 320 (D. Md. 1963). Sgt. Earl, covered under the Veterans Benefits Act (38 U.S.C. §301 et seq.), is nowhere precluded from suit against a negligent civilian employee. To grant Sgt. Earl and Mr. Crall immunity from suit because of a federal co-employee status with Mrs. Calder is unreasonable. Respondents are then entitled to sue Mrs. Calder since they are not subject to the LHWCA. However, Mrs. Calder (and now under the court's decision, all civilian employees), are unable to sue because suits against co-employees are precluded under 33 U.S.C. §933(i). Such a result was neither anticipated nor intended when Congress adopted the LHWCA as a compensation scheme for non-appropriated fund instrumentalities. The net effect of the court's holding is to preclude a suit by any civilian employee of a non-appropriated fund instrumentality who may be injured by a negligent servicemen in any of the countless military facilities throughout the world.

Respondents are not fellow servants immunized from suit under 33 U.S.C. §933(i). They are unrelated third parties who have no work connection to petitioner.

Respondents did not supervise Mrs. Calder and did not enjoy the same workers compensation coverage. Even under the regulations of the LHWCA as codified in 20 C.F.R. §701 et seq. Sgt. Earl and Mr. Crall did not meet the statutory definition of employee. If under 20 C.F.R. §701.301(a)(12), an "employee" cannot be anyone other than someone who may make a claim under the LHWCA, then a co-employee must also be able to make such claim. Sgt. Earl and Mr. Crall have no basis for a claim for compensation under the LHWCA.

The federal government does not meet the statutory definition of employer. If under 20 C.F.R., §701.301(a)(13) an "employer" is one who must be obligated to pay and secure workers compensation for its employees, then the United States is not Mrs. Calder's employer since the federal government is neither obligated nor secures compensation benefits for employees of the AAFES. Such benefits are obtained by the Exchange Service for its employees, 33 U.S.C. §907(a).

There is no employer-employee relationship between the AAFES and respondents. The court's decision is inconsistent with accepted standards for establishing an employer-employee relationship. Control is perhaps the most universally accepted standard. However the AAFES has no control, power or direction over respondents, much less the ability to hire and fire them. The Exchange Service is under no obligation to pay respondent's wages or workers compensation. Although the AAFES may be an instrumentality of the United States, it has no power to bind the United States by contract and the United States is not liable under contracts of the AAFES with third parties. **Pulaski Cab**

Co. v. United States, 157 F.Supp. 955 (Ct. Cl. 1958); **Jaeger v. United States,** 394 F.2d 944 (D.C. Cir. 1968). The government did not assume any of the financial obligations of the AAFES and therefore lacks all necessary criteria to establish an employer-employee relationship with respondents. **See Standard Oil Co. V. Johnson,** 316 U.S. 481 (1942). As a consequence, the parties cannot be co-employees.

Sgt. Earl also seeks immunity from suit under the **Feres** doctrine contending that protection should be afforded military personnel when they are subject to suit by civilian employees. **Feres v. United States,** 340 U.S. 135 (1950) stands for the proposition that an on-duty serviceman injured because of a government official's negligence cannot recover against the United States under the Federal Tort Claims Act, where the injuries arose out of or are in the course of activities incident to service. Sgt. Earl seeks to extend the **Feres** doctrine to immunize military personnel whereas civilian employees remain unprotected. This is a significant issue of major importance for all military personnel and civilian employees of the military. The issue should be settled by this court.

It is respectfully requested that a petition for certiorari be granted.

Respectfully submitted,

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"APPENDIX A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DORIS M. CALDER,

Plaintiff - Appellee,

v.

MAX D. CRALL and
SGT. TERRY L. EARL,

Defendants - Appellants.

No. 83-3744
No. 83-3782

D.C. No.
C-78-102-JLQ

OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding
Argued and submitted January 5, 1984

Before: WRIGHT, TANG, and ALARCON, Circuit Judges.
Filed February 24, 1984

ALARCON, Circuit Judge:

Max D. Crall (Crall) and Sgt. Terry L. Earl (Earl) appeal a judgment awarding personal injury damages to Doris M. Calder (Calder). We reverse the judgment, because we find that Calder's action is barred by the exclusivity provision of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 933(i).

FACTS

On March 27, 1975, at the time of the injury, Calder was employed by the Army and Air Force Exchange Service (AAFES) as a cashier at the Base Exchange Cafeteria at Fairchild Air Force Base, located in Spokane, Washington. Earl was a non-commissioned officer on active duty with the Air Force, assigned to Fairchild Air Force Base. Earl was ordered to post disaster shelter signs at various locations on the base. Crall, a civilian carpenter employed at the base, was assigned to assist Earl in posting the signs.

In order to post the metal shelter signs, Crall obtained a Ram-Set fastener gun from the base carpentry shop. The gun, activated by a .22 caliber shell, blasts a steel nail into concrete, steel or wood. When Crall and Earl were posting a shelter sign on an interior wall of the Base Operations Building, a nail from the gun penetrated the wall and struck Calder in the leg. Calder was treated for her injuries and received compensation under the LHWCA.

Calder brought a personal injury action against Crall and Earl [1]in Spokane County Superior Court for the State of Washington. The action was removed to federal district court pursuant to 28 U.S.C. § 1441. Crall and Earl moved to dismiss Calder's action on the ground that compensation under the LHWCA was her exclusive remedy. [2]Their motions were denied. Following trial, the jury returned a verdict in favor of Calder.

[1]At the close of the federal district court trial, a third defendant, Orville Lopp, Crall's supervisor, was granted a directed verdict.

[2]Earl also contended that Calder's claim was barred by **Feres v. United States,** 340 U.S. 135 (1950). As we find that the LHWCA bars her claim, we do not reach the **Feres** doctrine issue.

ANALYSIS

I.

Calder, at the time of her injury, was an AAFES employee. The AAFES is a nonappropriated fund instrumentality (NAFI). The activities of a NAFI are not funded by congressional appropriation. Thus, the salaries and workers' compensation benefits of NAFI employees are paid out of the earnings generated by the activities of the NAFI. Congress, even though it does not provide funding for NAFIs, requires NAFI employees to be compensated for work injuries under the LHWCA. 5 U.S.C. § 8171.

> The LHWCA includes an exclusivity provision as follows: The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is unjured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: **Provided**, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

33 U.S.C. § 933(i). Whether the phrase "persons in the same employ" includes armed forces employees other than employees of the Army and Air Force Exchange Service (AAFES) is a question of law subject to **de novo** review on appeal.

The district court limited "persons in the same employ" to persons who are also covered under the LHWCA. Since Crall and Earl are covered by other federal workers' compensation acts, they have no rights under the LHWCA. The district court concluded that, since Crall and Earl were not persons who were entitled to compensation under the LHWCA, they were not "in the same employ" as Calder. Accordingly, the district court held that right to compensation under the

LHWCA was not Calder's exclusive remedy for the injury she suffered because of their negligence. The district court erred in applying 20 C.F.R. § 701.301(12) and (13) to the exclusivity provision of the statute (5 U.S.C. § 933(i)).

II.

In reaching its decision, the district court relied on 20 C.F.R. § 701.301(12) and (13), which define "employee" as one "to whom an injury . . . may be the basis for a compensation claim under the LHWCA" and "employer" as one obligated "under the provisions of the LHWCA . . . to pay and secure compensation as provided therein."

We begin our analysis by noting that the C.F.R. itself states that these definitions provide "guidance as to the meaning and use of specific terms in the several parts of this subchapter [subchapter A]." 20 C.F.R. § 701.102.

> This subchapter [subchapter A] contains the regulations governing the administration of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) and its direct extensions, the Defense Base Act (DBA), the District of Columbia Workmen's Compensation Act (DCCA), the Outer Continental Shelf Lands Act (OCSLA), and the Nonappropriated Fund Instrumentalities Act (NFIA), and such other amendments and extensions as may hereinafter be enacted.

20 C.F.R. § 701.101. These regulations delineate claims procedures, administrative adjudication procedures for contested claims, medical procedures and insurance authorization procedures. The term employee is used in the regulations to describe persons entitled to receive compensation under the LHWCA. No reference is made in the regulations to those persons who may be immune to suit under the statute. Although the definitions found in 20 C.F.R. § 701.301 are valid for their stated purpose of understanding the administrative regulations of the LHWCA, they do not control the definition of the phrase "persons in the same employ" found in the statute.

The fact that Congress exempted NAFI employees from coverage under the Federal Employees Compensation Act (5 U.S.C. § 2105(c)) and provided coverage under the LHWCA instead does not mean that NAFI employees cannot be considered to be in the same employ as other employees of the United States. Although AAFES employees are not paid out of congressionally appropriated funds, AAFES employees, when performing their official duties, are federal employees. **United States v. Hopkins,** 427 U.S. 123, 128 (1976) (per curiam); **United States v. Forfari,** 268 F.2d 29 (9th Cir.), **cert. denied,** 361 U.S. 902 (1959). AAFES employees may not sue the United States in a personal injury action; the LHWCA is their exclusive remedy. 5 U.S.C. § 8173. On the other hand, because AAFES employees are federal employees, the United States may be held liable for their negligence under the Federal Tort Claims Act. H. Rep. No. 91-933, 91st Cong., 2d Sess., **reprinted in** 1970 U.S. Code Cong. and Admin. News 3477, 3478.

Furthermore, the AAFES is an integral part of the military structure. **Standard Oil Co. v. Johnson,** 316 U.S. 481, 485 (1942). The AAFES, a joint command of the Army and Air Force, was established to provide for the welfare of the Army and Air Force pursuant to the general authority Congress granted to the Secretary of the Army and the Secretary of the Air Force. 10 U.S.C. §§ 3012, 8012. The Board of Directors of the AAFES is ultimately responsible to the Secretaries through the Army and Air Force Chiefs of Staff. Army Reg. 60-10, Air Force Reg. 147-7, ¶ 1-5. AAFES provides military personnel and their dependents with low cost merchandise and services. The earnings generated by these activities are used "to supplement appropriated funds for the support of Army and Air Force welfare and recreational programs." Army Reg. 60-10, Air Force Reg.147-7, ¶ 1-2.

Calder was employed by the AAFES on the Fairchild Air Force Base. Crall and Earl were also employed on that base. All were federal employees under the jurisdiction of the Department of the Air Force. All worked for the same employer and were therefore in the same employ for purposes of 33 U.S.C. § 933(i). Calder's suit against Crall and Earl should have been barred. The judgment of the district court is REVERSED.

"APPENDIX B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DORIS M. CALDER, Plaintiff - Appellee, v. MAX D. CRALL, and SGT. TERRY L. EARL, Defendants - Appellants.	)	No. 83-3744 No. 83-3782 **ORDER**

Before: WRIGHT, TANG and ALARCON, Circuit Judges.

Filed May 24, 1984

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P.35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

"APPENDIX C"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DORIS M. CALDER,

Plaintiff - Appellee,

v.

MAX D. CRALL and
SGT. TERRY L. EARL,

Defendants - Appellants.

No. 83-3744

No. 83-3782

ORDER

Filed June 18, 1984

The issuance of the mandate in this matter is ordered stayed until July 30, 1984.

No. 84-154

In the Supreme Court of the United States

OCTOBER TERM, 1984

DORIS M. CALDER, PETITIONER

v.

MAX D. CRALL AND SGT. TERRY L. EARL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT EARL IN OPPOSITION

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-154

DORIS M. CALDER, PETITIONER

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MAX D. CRALL AND SGT. TERRY L. EARL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT EARL IN OPPOSITION

Petitioner, an employee of the Army and Air Force Exchange Service (AAFES), brought this personal injury action against respondents Terry L. Earl, a serviceman on active duty in the Air Force, and Max D. Crall, a civilian employee of the Air Force, in their individual capacities.[1] Petitioner seeks review of a decision of the court of appeals holding that petitioner's action is barred by the exclusivity provision of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(i).

1.a. On March 27, 1979, respondent Earl was ordered to post disaster shelter signs at various locations throughout Fairchild Air Force Base, in Spo-

[1] The Department of Justice represents respondent Earl; respondent Crall is separately represented.

kane, Washington (Pet. App. 12). Respondent Crall, a carpenter employed at the base, was assigned to assist respondent Earl (*ibid.*). Petitioner, who was employed by the AAFES as a cashier at the base cafeteria, was injured when a nail fired by respondent Crall from a fastener gun penetrated a wall and struck her in the leg (*ibid.*). Petitioner received compensation for her injury under the LHWCA, her workers' compensation scheme.[2] She then brought this personal injury action seeking additional recovery from respondents Earl and Crall in their individual capacities.[3]

b. The exclusivity provision of the LHWCA bars a personal injury action by a covered employee for additional recovery against "persons in the same employ" (33 U.S.C. 933(i)). Accordingly, respondents moved to dismiss petitioner's action on the ground that petitioner was precluded from suing fellow federal employees. Respondent Earl, an active duty serviceman, also argued that petitioner's personal injury action was inconsistent with the policies underlying the *Feres* doctrine. See *Feres* v. *United States*, 340 U.S. 135 (1950). The district court denied the motions and the jury found in favor of petitioner, awarding her $25,000 (Pet. App. 12).

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[2] The AAFES is a nonappropriated fund instrumentality (NAFI); that is, its operations are funded from Exchange earnings, not from congressional appropriations. NAFI employees receive workers' compensation benefits under the LHWCA rather than under the Federal Employees' Compensation Act (FECA). See 5 U.S.C. 8171(a) and (b); 5 U.S.C. 2105(c).

[3] Orville Lopp, Crall's supervisor, also was named as a defendant. He was granted a directed verdict at the close of trial (Pet. App. 12 n.1).

c. The court of appeals reversed (Pet. App. 16). The court held that because petitioner and respondents all were federal employees working at Fairchild Air Force Base under the jurisdiction of the Department of the Air Force, they were "persons in the same employ" for purposes of 33 U.S.C. 933(i) (Pet. App. 16). Having concluded that petitioner's action was barred by statute, the court of appeals did not reach the question whether this action against respondent Earl was inconsistent with the policies underlying the *Feres* doctrine (Pet. App. 12 n.2).

2. The decision of the court of appeals is correct and does not warrant further review. The petition simply reiterates the arguments that were thoroughly analyzed, and rejected, by the court of appeals. For the reasons aptly stated in the court's decision, petitioner's contention that her fellow federal employees were not her "co-employees" under the LHWCA is without merit.

a. Petitioner urges this Court to review "the Court of Appeals' failure to recognize that Army-Air Force Exchange Service employees were specifically excluded as federal employees for purposes of worker's compensation, and are entitled to sue negligent third persons" (Pet. 7). Contrary to petitioner's assertion, however, the court of appeals was fully aware that AAFES employees are covered under the LHWCA, rather than under FECA, and that the LHWCA allows an employee to sue a 'third party" (Pet. App. 13). But the fact that NAFI employees are exempt from FECA coverage does not mean that NAFI employees are not "employees of the United States" (*id.* at 15). Although AAFES employees are exempt from FECA, the AAFES is nevertheless an

integral part of the United States military structure;[4] and AAFES employees, when performing their official duties, are federal employees. *Id.* at 15-16 (citing *United States* v. *Hopkins*, 427 U.S. 123, 128 (1976)); *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942); *United States* v. *Forfari*, 268 F.2d 29 (9th Cir.), cert. denied, 361 U.S. 902 (1959).[5] Thus, the court of appeals correctly concluded that respondents were petitioner's co-employees, because petitioner and respondents all were federal employees under the jurisdiction of the Department of the Air Force (Pet. App. 16).

b. Citing internal regulations of the Department of Labor (20 C.F.R. 701.301(a)(13)), petitioner argues (Pet. 9) that the federal government does not meet "the statutory definition" of employer. The regulations define an "employer" as an employer obligated to pay and secure compensation under the LHWCA. 20 C.F.R. 701.301(a)(13). However, as

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[4] The statutory provision that exempts NAFI employees from FECA coverage specifically provides that the exemption "does not affect the status of these nonappropriated fund activities as Federal instrumentalities." 5 U.S.C. 2105(c).

[5] Petitioner attempts to distinguish *United States* v. *Forfari*, *supra*, on the ground that *Forfari* involved a suit by a NAFI employee against the United States under the Federal Tort Claims Act, an action specifically precluded by statute (Pet. 7-8). However, *Forfari* was decided prior to the passage of 5 U.S.C. 8173, which now bars suits by NAFI employees against the United States. In reasoning directly applicable to this case, the *Forfari* court concluded that NAFI employees are still employees of the United States, notwithstanding that they are exempt from FECA coverage and their workers' compensation benefits are paid by the NAFI, not the United States. 268 F.2d at 31-33.

the court of appeals noted (Pet. App. 15), these Department of Labor regulations are directed to the internal administration of the LHWCA—for instance, claims procedures, administrative adjudication of contested claims, medical procedures, and insurance authorization procedures. The regulations do not purport to be and are not an authoritative definition of the term "employer" for the purpose of construing the statutory language "persons in the same employ" (Pet. App. 15).

c. Petitioner's contention that it is "unreasonable" to preclude her from suing respondent Earl when he is "nowhere precluded" from suing her (Pet. 8) is without merit. Traditional doctrines of intra-service immunity have been held to preclude an injured serviceman from suing a civilian Exchange Service employee. See *Hass* v. *United States*, 518 F.2d 1138, 1142-1143 (4th Cir. 1975).

In sum, this case presents a narrow issue of statutory construction, which was correctly resolved by the court of appeals.[6] As petitioner concedes (Pet. 7), the "issue is one of first impression" and thus the decision below does not conflict with the decision of any other court. Accordingly, further review is not warranted.

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[6] Although the scope of the *Feres* doctrine undoubtedly is important to military personnel (Pet. 10), that issue does not arise in this case. Petitioner's suit is clearly precluded by statute, 33 U.S.C. 933(i). Whether such an action is also inconsistent with the policies underlying the *Feres* doctrine is not presented. See Pet. App. 12 n.2.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1984

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